Deputy Public Prosecutor v Amar Asyraf bin Zolkepli (Public Islamic Bank Bhd, third party) (Messrs Wan Shahrizal, Hari & Co, intervener)

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05-573–11 OF 2018

KAMALUDIN MD SAID, HADHARIAH ISMAIL AND NORDIN HASSAN JJCA

29 SEPTEMBER 2020

Civil Procedure — Appeal — Intervention — Appellant appealed against High Court's decision in allowing claim for legal fees of seized properties by intervener — Whether legal fees of counsel representing respondent can be paid from properties seized under s 50(1) and 51(1) — Whether counsel of unpaid legal fees has legitimate legal interest in respondent's properties as laid down under s 61(4)(a) — Whether inability of payment of legal fees from seized property should be considered as hindering rights to counsel — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 50(1), s 51(1), 56(1) & 61(4)(a) — Federal Constitution art 5(3)

The appellant filed an appeal against part of the decision of the High Court of Temerloh in allowing the application by the intervener, Messrs Wan Shahrizal, Hari & Co. The intervener's application was for the respondent's legal fees in the amount of RM398,722to be paid to the intervener from the amount seized from the respondent pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). On 30 June 2016, the respondent was arrested for offences under s 5 of the Computer Crimes Act 1997 and ss 124 and 130 of the Penal Code. Having satisfied that the respondent's movable and immovable properties were the proceeds of an unlawful activity,the public prosecutor issued a seizing order against the properties pursuant to ss 50(1) and 51(1) of the Act. The public prosecutor filed an application to the High Court for an order of forfeiture of the said properties pursuant to s 56(1) of the Act. As required under s 61 of the same Act, a third-party notice was published in the *Gazette* to allow any party who had interest in the properties to attend court and to give reasons as to why the properties shall not be forfeited. Subsequently, Public Islamic Bank Bhd, the third party in the present appeal, made a claim on the monies in the fixed saving account No 1804354928 at Public Bank Bhd in the sum of RM102,089.20 and the apartment, R-05-36, Pangsapuri Radius Residence, Jalan SH 1/2 Batu, Selayang Heights, 68100, Batu Caves, Selangor. Messrs Wan Sharizal, Hari & Co, as intervener, claimed the legal fees for representing the respondent in the sum of RM398,722 from the respondent's seized

properties. The High Court judge decided that the claims by the third party and the intervener were allowed. The appellant submitted that the intervener failed to prove, on the balance of probabilities, that the intervener was a bona fide third party as the requirement laid down under s 61(4) of the Act was not satisfied. It was further contended by the appellant that the legal fees could not be paid from the respondent's seized properties as they were the proceeds of an unlawful activity. Counsel for the intervener contended that it was the respondent's rights to be represented by counsel or legal practitioner as enshrined under art 5(3) of the Federal Constitution and the application of the article, indirectly, imposes the responsibility on the respondent to pay his legal fees or otherwise, no counsel would represent any person whose properties has been seized under the Act.

Held, allowing appeal and setting aside High Court's decision:

(1) The scheme and purpose of the Act was to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act including preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting the provision of s 61(4) of the Act. It was appropriate for the application of the purposive approach and to have regard to the intention of the legislature, inter alia, that no one should enjoy the proceeds of an unlawful property which included the payment of the respondent's legal fees to the intervener. There was no express provision under the Act that allowed the proceeds of the unlawful activity to be used for payment of legal fees. The law in Singapore and Malaysia had no such express provision as the South African POCA which allows for the payment of the legal expenses from the seized property. The High Court judge erred in allowing the intervener's application for the legal fees to be paid from the respondent's seized properties as there was no express provision allowing the said application and it was against the intention of the Legislature in enacting the Act (see paras 33, 35 & 37).

(2) In the circumstances, the intervener has the recourse to take legal action against the respondent for the unpaid legal fees under the said contract. The action was an action in personam and no proprietary interest could be attached to the respondent's seized properties which was the proceeds of an unlawful activity. It was applicable only if judgment was obtained against the respondent for the payment of the legal fees, which was none in the present case. If legal fees or any unpaid debt can be paid from the seized property under the Act, in particular if the debt is only based on the bill issued by the creditor, arrangement can easily be made by the creditor and the owner of the seized property to avoid the forfeiture of the said property. It would frustrate the intention of the legislature and not in compliance with s 61(4)(d) of the Act. The court was of the considered

A view that the respondent's legal fees could not be paid from his seized properties and the intervener had no legitimate legal interest in the property. The intervener could not be considered as a bona fide third party under the Act (see paras 41–43).

B (3) The court agreed that the right was guaranteed under the Federal Constitution as provided under art 5(3). The fact that payment of legal fees could not be made from the seized property, as it was the proceeds of an unlawful activity, should not be considered as hindering the rights to counsel. The issue of rights to counsel raised by the counsel for the C intervener was untenable. The contention by counsel for the intervener that art 5(3) of the Federal Constitution indirectly, imposes the responsibility on the respondent to pay his legal fees was misconceived. Nothing in art 5(3) or other related articles that could be discerned to impose the responsibility to pay the legal fees (see paras 44 & 47).

D

[Bahasa Malaysia summary

Perayu memfailkan rayuan terhadap sebahagian keputusan Mahkamah Tinggi Temerloh yang membenarkan permohonan pihak pencelah, Tetuan Wan Shahrizal, Hari & Co. Permohonan pihak pencelah adalah untuk fi guaman E responden berjumlah RM398,722 untuk dibayar kepada kepada pihak pencelah daripada jumlah yang dirampas dari responden menurut s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta tersebut'). Pada 30 Jun 2016, responden telah ditangkap kerana kesalahan di bawah s 5 Akta Jenayah F Komputer 1997 dan ss 124 dan 130 Kanun Keseksaan. Setelah berpuas hati bahawa harta alih dan harta tak alih milik responden adalah hasil daripada aktiviti yang tidak sah, pendakwa raya mengeluarkan perintah penyitaan terhadap harta tersebut menurut ss 50 (1) dan 51 (1) Akta tersebut. Pihak pendakwaan memfailkan permohonan ke Mahkamah Tinggi untuk suatu G perintah penyitaan harta tersebut berdasarkan s 56(1) Akta tersebut. Seperti yang diperlukan di bawah s 61 Akta yang sama, notis pihak ketiga diterbitkan dalam *Warta* untuk membenarkan mana-mana pihak yang mempunyai kepentingan dalam harta tanah tersebut untuk hadir ke mahkamah dan menyatakan alasan kenapakah hartanah tersebut tidak patut dilelong. H Lanjutan itu, Public Islamic Bank Bhd, pihak ketiga dalam rayuan semasa, membuat tuntutan wang dalam akaun simpanan tetap bernombor 1804354928 di Public Bank Bhd dengan jumlah RM102,089.20 dan sebuah pangsapuri, R-05-36, Pangsapuri Radius Residence, Jalan SH 1/2 Batu, Selayang Heights, 68100, Batu Caves, Selangor. Tetuan Wan Sharizal, Hari & I Co, sebagai pihak pencelah, menuntut fi guaman sebagai mewakili responden dengan jumlah RM398,722 dari harta benda yang disita oleh responden. Hakim Mahkamah Tinggi memutuskan bahawa tuntutan oleh pihak ketiga dan mencelah dibenarkan. Perayu menghujahkan bahawa pihak pencelah gagal membuktikan, berdasarkan imbangan kebarangkalian, bahawa pihak

pencelah adalah pihak ketiga yang suci hati oleh kerana keperluan yang ditetapkan di bawah s 61(4) Akta tersebut tidak dipenuhi. Ianya dihujahkan dengan lebih lanjut oleh perayu bahawa fi guaman tidak dapat dibayar dari harta benda yang disita oleh responden kerana ianya adalah hasil dari kegiatan yang tidak sah. Peguam untuk pihak pencelah berpendapat bahawa ianya adalah hak responden untuk diwakili oleh peguam atau pengamal undang-undang seperti yang termaktub di bawah perkara 5(3) Perlembagaan Persekutuan dan pengunaan perkara tersebut, secara tidak langsung, mengenakan tanggungjawab kepada responden untuk membayar fi guaman atau sebaliknya, tidak ada peguam yang akan mewakili seseorang yang harta bendanya telah disita di bawah Akta tersebut.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Skema dan tujuan Akta tersebut adalah untuk mencegah penggubahan wang dan penyitaan hasil dari kegiatan yang tidak sah seperti yang ditetapkan di bawah Akta tersebut termasuk mencegah seseorang atau badan daripada memperoleh sebarang keuntungan dari hasil kegiatan yang tidak sah. Dalam keadaan tersebut, pendekatan bertujuan harus diambil dalam menafsirkan peruntukan s 61(4) Akta tersebut. Ianya adalah wajar untuk penggunaan pendekatan bertujuan dan mengambilkira niat badan perundangan, antara lain, agar tidak ada seseorang yang harus menikmati hasil dari harta yang tidak sah termasuklah pembayaran fi guaman responden kepada pihak pencelah. Tidak ada peruntukan yang jelas di bawah Akta tersebut yang membenarkan hasil aktiviti tidak sah tersebut digunakan untuk pembayaran fi guaman. Undang-undang di Singapura dan Malaysia tidak mempunyai peruntukan yang jelas seperti POCA di Afrika Selatan yang membenarkan pembayaran perbelanjaan guaman dari harta benda yang disita. Hakim Mahkamah Tinggi terkhilaf dalam membenarkan permohonan pihak pencelah supaya bayaran fi guaman untuk dibayar dari harta benda responden yang disita kerana tidak ada peruntukan yang jelas yang membenarkan permohonan tersebut dan ianya bertentangan dengan niat Badan Perundangan dalam menggubal Akta tersebut (lihat perenggan 33, 35 & 37).

(2) Dalam keadaan tersebut, pihak pencelah memiliki laluan untuk mengambil tindakan undang-undang terhadap responden untuk fi guaman yang belum dibayar berdasarkan kontrak tersebut. Tindakan tersebut adalah tindakan in personam dan tidak ada kepentingan hak milik yang dapat diletakkan pada harta benda responden yang disita yang merupakan hasil daripada aktiviti yang tidak sah. Ianya hanya boleh diguna pakai sekiranya penghakiman telah diperoleh terhadap responden untuk pembayaran fi guaman, yang tidak ada pada kes ini. Sekiranya fi guaman atau hutang yang belum dibayar dapat dibayar dari

harta benda yang disita di bawah Akta tersebut, khususnya sekiranya hutang tersebut adalah berdasarkan bil yang dikeluarkan oleh pemiutang, pembayaran lebih mudah akan dibuat oleh pemiutang dan pemilik harta benda yang disita untuk mengelakkan harta benda tersebit dilelong. Ini akan menggagalkan niat badan perundangan dan bertentangan dengan s 61(4)(d) Akta tersebut. Mahkamah berpendapat bahawa fi guaman responden tidak dapat dibayar dari harta benda yang disita dan pihak pencelah tidak mempunyai kepentingan perundangan yang sah terhadap harta benda tersebut. Pihak pencelah tidak boleh dianggap sebagai pihak ketiga yang suci hati di bawah Akta tersebut (lihat perenggan 41–43).

(3) Mahkamah bersetuju bahawa hak tersebut dijamin di bawah Perlembagaan Persekutuan seperti yang diperuntukkan di bawah perkara 5(3). Fakta bahawa pembayaran fi guaman tidak dapat dibayar dari harta benda yang disita, kerana merupakan hasil dari kegiatan yang tidak sah, tidak harus dianggap sebagai penghalang hak untuk peguam. Isu hak untuk peguam yang dibangkitkan oleh peguam untuk pihak pencelah tidak boleh dipertahankan. Hujahan oleh peguam untuk pihak pencelah bahawa perkara 5(3) Perlembagaan Persekutuan secara tidak langsung, menetapkan tanggungjawab kepada responden untuk membayar fi guaman adalah salah. Tidak dinyatakan dalam perkara 5(3) atau perkara lain yang berkaitan yang dapat diguna pakai untuk menetapkan tanggungjawab untuk membayar fi guaman (lihat perenggan 44 & 47).]

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)

Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal [2013] 1 SLR 444; [2012] SGCA 65, CA (refd)

Dato' Seri Ir Haji Mohammad Nizar Jamaluddin v Dato' Seri Zambry Abdul Kadir; Attorney General (intervener) [2010] 2 CLJ 925, FC (folld)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya Criminal Appeal W-09–432–11 Tahun 2016 (unreported), CA (refd)

Teh Tek Soon lwn Pendakwa Raya [2015] MLJU 2212; [2015] 1 LNS 1504, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), 50(1), (1)(c), 51(1), (1)(c), 56(1), (1)(c), 61, 61(1)(a), (1)(b), (1)(c), (1)(d), (4), (4)(a), (4)(d)
Computer Crimes Act 1997 s 5
Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act [SG] s 13
Federal Constitution art 5(3)
Interpretation Acts 1948 and 1967 s 17A
Penal Code ss 124, 130
Prevention of Crime Act 1998 [SA]

Appeal from: Criminal Application No CB-44–04–06 of 2017 (High Court, Temerloh)

Shafi bin Othman (Muhammad Rafique bin Ali with him) (Wan Sahrizal, Hari & Co) for the appellant.
Dusuki bin Mokhtar (Zaki Asyraf bin Zubir with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nordin Hassan JCA (delivering judgment of the court):

INTRODUCTION

[1] The public prosecutor, the appellant, filed an appeal against part of the decision of the High Court of Temerloh in allowing the application by the intervener, Messrs Wan Shahrizal, Hari & Co. The intervener's application was for the respondent's legal fees in the amount of RM398,722 to be paid to the intervener from the amount seized from the respondent pursuant to sub-s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act').

THE BACKGROUND FACTS

[2] The material facts in the present appeal are the following. On 30 June 2016, the respondent, Amar Asyraf bin Zolkepli was arrested for offences under s 5 of the Computer Crimes Act 1997 and ss 124 and 130 of the Penal Code. Investigation revealed that the respondent has obtained a computer software which enable to access the MYIMMs system of the Immigration Department without using the biometric which are the password or finger print. The respondent then provided the software to a syndicate that used the software to access the MYIMMs system and to apply and approved the 'Pas Penggajian Pengurusan Pegawai Dagang' and 'Pas Penggajian Pegawai Dagang' unlawfully. In return, the respondent was paid RM1,000 for every approval using the said software.

[3] On 19 September 2016, having satisfied that the respondent's movable and immovable properties listed below were the proceeds of an unlawful activity, the public prosecutor issued a seizing order against the properties pursuant to ss 50(1) and 51(1) of the Act. The properties are as follows:

(a) RM192,147.79 in a saving account, No 106062056732 at Malayan Banking, Genting Highland Branch, Pahang;

(b) RM259,681.45 in a saving account, No 4835919335 at Public Bank Bhd, Taman Maluri Cheras, Kuala Lumpur;

(c) RM102,089.20 in a fixed saving account, No 1804354928 at Public Bank Bhd, Petaling Jaya, Selangor;

(d) an apartment at Batu Caves, Selangor with its address No R-05-36, Pangsapuri Radius Residence, Jalan SH 1/2 Batu, Selayang Heights, 68100, Batu Caves, Selangor; and

(e) a car, Audi S Line TFSI CVT(A), with registration No JRC 80.

[4] Thereafter, the public prosecutor filed an application to the judge of the High Court for an order of forfeiture of the said properties pursuant to s 56(1) of the Act. As required under s 61 of the same Act, a third-party notice was published in the *Gazette*, PU (B) 167/2018, to allow any party who has interest in the properties to attend court and to give reasons as to why the properties shall not be forfeited.

[5] Subsequently, Public Islamic Bank Bhd, the third party in the present appeal, made a claim on the monies in the fixed saving account No 1804354928 at Public Bank Bhd in the sum of RM102,089.20 and the apartment, R-05-36, Pangsapuri Radius Residence, Jalan SH 1/2 Batu, Selayang Heights, 68100, Batu Caves, Selangor.

[6] Messrs Wan Sharizal, Hari & Co, as intervener, has claimed the legal fees for representing the respondent in the sum of RM398,722 from the respondent's seized properties.

[7] Having heard the evidence and submission by parties, the High Court judge made his findings and decided that the claims by the third party and the intervener were allowed.

[8] The prosecution is now appealing only against the decision of the High Court judge in allowing the claim by the intervener for the legal fees.

THE GROUNDS OF APPEAL

[9] In challenging the High Court's decision, the deputy public prosecutor raised only one issue, that the intervener has failed to fulfill the requirement of s 61(4) of the Act to qualify as the bona fide third party which entitled the intervener to be paid the respondent's legal fees from the respondent's seized properties.

THE APPELLANT'S SUBMISSION

[10] In essence, the deputy public prosecutor submitted that the intervener has failed to prove, on the balance of probabilities, that the intervener was a bona fide third party as the requirement laid down under s 61(4) of the Act has not been satisfied.

[11] Further, it was the appellant's contention that the legal fees cannot be paid from the respondent's seized properties as they were the proceeds of an unlawful activity. This, the appellant submitted will open the 'flood gates' for numerous claims, independent of s 61(4) of the Act.

THE RESPONDENT'S SUBMISSION.

[12] Conversely, counsel for the intervener submitted that the intervener was a *bona fide* third party and has the legitimate legal interest in the respondent's properties that were seized by the police pursuant to ss 50(1) and 51(1) of the Act. On this issue, it was submitted that this court had allowed the claimant's claim for legal fees from the properties seized under the Act in the case of *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal W-09–432–11 Tahun 2016.

[13] It was further submitted that all the requirements under s 61(4) of the Act has been satisfied by the intervener.

[14] Counsel for the intervener also contended that it is the respondent's rights to be represented by counsel or legal practitioner as enshrined under art 5(3) of the Federal Constitution and the application of this article, indirectly, imposes the responsibility on the respondent to pay his legal fees. Otherwise, no counsel would represent any person whose properties has been seized under the Act.

DELIBERATION AND DECISION OF THIS COURT

[15] The core issues in the present appeal is clear that is, whether the legal fees of counsel representing the respondent can be paid from properties that has

A been seized under ss 50(1) and 51(1) of the Act and whether the counsel, by virtue of the unpaid legal fees, has a legitimate legal interest in the respondent's properties as laid down under s 61(4)(a) of the Act.

B **[16]** In determining the said issues, it is pertinent to appreciate the objective and the scheme of the Act along with its provisions that are relevant in the present appeal. The objective or purpose of the Act is reflected in its preamble which is the following:

> An Act to provide for the offence of money laundering, the measures to be taken for
> C *the prevention of money laundering* and terrorism financing offences and *to provide for the forfeiture of property involved in or derived from money laundering* and terrorism financing offences, *as well as* terrorist property*, proceeds of an unlawful activity* and instrumentalities of an offence, and for matters incidental thereto and connected therewith. (Emphasis added.)

D **[17]** Clearly, the objective of the Act, inter alia, are prevention of money laundering and the forfeiture of property which involved in or derived from proceeds of an unlawful activity.

E **[18]** The offence of money laundering has been laid down under s 4(1) of the Act which states:

> 4 (1) Any person who —
>
> (a) *engages, directly or indirectly, in a transaction that involves proceeds of an*
> F *unlawful activity or instrumentalities of an offence*;
>
> (b) *acquires, receives, possesses*, disguises, transfers, converts, exchanges, carries, disposes of or *uses proceeds of an unlawful activity* or instrumentalities of an offence;
>
> G (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an
> H offence,
>
> commits a *money laundering offence* and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million
> I ringgit, whichever is the higher. (Emphasis added.)

[19] Further, 'proceeds of unlawful activity' has been defined under s 3(1) of the Act is as follows:

'proceeds of an unlawful activity' means any property, or any economic advantage or economic gain from such property, within or outside Malaysia — A

(a) which is wholly or partly —

(i) *derived or obtained, directly or indirectly, by any person from an unlawful activity*; B

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or C

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed falling within the scope of subparagraph (a)(i),(ii), or (iii). (Emphasis added.) D

[20] The Act has also defined the meaning of unlawful activity as follows: E

'*unlawful activity*' means —

(a) any activity which constitutes any *serious offence* or any foreign serious offence; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence, regardless whether such activity, wholly or partly, takes within or outside Malaysia. (Emphasis added.) F

[21] Next, serious offence is defined under the Act in the following words: G

'*serious offence*' means —

(a) *any of the offences specified in the Second Schedule*;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences. (Emphasis added.) H

[22] Reverting to the present case, the public prosecutor, based on information given by the Investigating Officer, had exercised his power pursuant to ss 50(1)(c) and 51(1)(c) of the Act to seized the properties of the respondent having satisfied that the properties were the proceeds of an unlawful activity. For ease of reference, the said provisions are the following: I

(a) s 50(1)

Where the Public Prosecutor is satisfied on information given to him by an

A investigating officer that any movable property or any accretion to it which is —

(a) ...

(b) ...

B (c) *the proceeds of an unlawful activity*; or

(d) ...

is in the possession, custody or control of a financial institution, he may, not with standing any other written law, by order direct the such movable C property or any accretion to it in the financial institution *be seized* by the investigating officer or by order direct the financial institution not to part with it, deal in or otherwise dispose of such movable property or any accretion to it, in whole or in part, until the order is varied or revoked.

(b) s 51(1)

D Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is —

(a) ...

(b) ...

E (c) *the proceeds of an unlawful activity*; or

(d) ...

the Public Prosecutor may by order direct that such immovable property be seized by the investigating officer. (Emphasis added.)

F

[23] Here, we find the seizure of the respondent's properties were in accordance with the law as alluded to earlier premised on the ground that the properties were proceeds of an unlawful activity.

G

[24] The next pertinent stage in this case was the public prosecutor's application for the forfeiture of the said properties although no prosecution has been made against the respondent. The said application was made pursuant to s 56(1)(c) of the Act which states:

H 56 (1) *Subject to section 61*, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an I order of forfeiture of that property if he is satisfied that such property is —

(a) ...

(b) ...

(c) *the proceeds of an unlawful activity*; or

(d) ... (Emphasis added.)

[25] In relation to this provision, it was the intention of the Parliament that money launderer which includes any person that acquires proceeds of an unlawful activity, should not enjoy the benefit of their crime even though there is no prosecution made or conviction obtained for an offence. This intention is reflected at para 60 of the explanatory statement to the Act which states the following:

> 60 Clause 56 seeks to empower the Public Prosecutor, where there is no prosecution or conviction for an offence, to apply to a court for the forfeiture of any property that he is satisfied has been obtained as a result of, or in the connection with such offence. If there is no conviction or forfeiture, the property seized shall be released to the person from whom it was seized. *This is to ensure that even if there is no conviction but the court is certain that property has been obtained as a result of the offence the money launderers do not enjoy the benefits of their crimes.* (Emphasis added.)

[26] The intention of the Legislature was further reflected in the Deputy Finance Minister's statement when tabling the bill of the said Act as reported in Hansard dated 9 May 2001 which is as follows:

> Fasal 55 hingga 59 menjelaskan, kuasa mahkamah dalam membuat perintah perlucutan ke atas harta yang dibuktikan menjadi hal perkara kepada kesalahan pengubahan wang haram dan kuasa Pendakwa Raya bagi memohon kepada Hakim Mahkamah Tinggi untuk perlucuthakan ke atas harta dibuat jika tiada pendakwaan atau sabitan direkodkan bagi kesalahan pengubahan wang haram.
>
> Selain dari itu, dijelaskan juga bahawa kesahan pembekuan, penyitaan atau jualan hendaklah tidak terjejas oleh apa-apa halangan berkaitan dengan bentuk atau cara ia dilaksanakan.
>
> *Fasal-fasal berkenaan juga menjelaskan mengenai peletakan harta yang dilucutkan kepada Kerajaan Persekutuan dan perintah penalti kewangan yang boleh dibuat oleh Mahkamah Sesyen atas permohonan sesuatu agensi penguatkuasa ke atas orang darinya suatu harta telah dilucutkan dan telah mendapat faedah dari perlakuan kesalahan pengubahan wang haram tersebut.* (Emphasis added.)

[27] The scheme of the Act and its purpose as can be gleaned from the provisions mentioned above, the Explanatory Statements and the explanation by the Deputy Finance Minister when tabling the Bill, is clear, among others, that no person should receive any benefit from the proceeds of an unlawful activity and in particular the person who directly involves in the said unlawful activity.

[28] Be that as it may, the scheme of the Act also provides for the return of the property seized or forfeited to bona fide third party who has legitimate legal interest in the property. This is provided under s 61 of the Act which states:

(1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that —

(a) *the claimant has a legitimate legal interest in the property;*

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under the circumstances that *give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property*; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property. (Emphasis added.)

[29] In the explanatory statement to the Act, at para 65, it states the following:

> 65. Clause 61 seeks to require a notice to be given of an order of forfeiture so that a third party claiming a legitimate interest in the property may appear in support of his claim. The court shall return the property seized or forfeited where the person has a legitimate legal interest in the property

[30] Further, in *Hansard* dated 10 May 2001, the Deputy Finance Minister was reported has explained the provision of s 61 as follows:

> Berhubung dengan kuasa untuk membuat permohonan bagi perintah perlucutan hak yang terhad kepada Pendakwa Raya dan bukanlah terbuka kepada orang awam, adalah dimaklumkan bahawa kuasa membuat permohonan perlucuthakan di bawah rang undang-undang adalah lanjutan kepada kuasa-kuasa penyiasatan, penyitaan dan pembekuan yang diberikan kepada Pendakwa Raya dan tambahan pula mengikut prosedur yang diterima Pendakwa Raya adalah pihak yang wajar dalam kuasa ini.

Isu pembelian dengan suci hati atau yang dikatakan bona fide tadi, berhubung dengan isu tuntutan yang boleh dibuat oleh pembeli dengan suci hati, hak-hak pembeli dengan suci hati dan orang lain yang boleh menunjukkan kepentingan sah mereka dalam satu harta itu adalah terpelihara di bawah rang undang-undang ini yang membolehkan mereka yang mempunyai hak yang sah dalam harta yang akan dilucuthakan untuk menyatakan sebab-sebab mengapa harta mereka tidak boleh dilucuthakan. Sama ada pegawai yang diberi kuasa akan mengemukakannya menurut rule of law, jadi setiap penggunaan kuasa yang diberi dibawah rang undang-undang ini akan tertakluk kepada rule of law yang sedia ada dalam sistem perundangan kita di Malaysia. (Emphasis added.)

[31] Here, the intention of the Legislature was that the property seized or forfeited under the Act can be returned to the claimant who has established his legitimate legal interest in the property and satisfied the requirement of s 61(4). This court in the case of *Teh Tek Soon lwn Pendakwa Raya* [2015] MLJU 2212; [2015] 1 LNS 1504 has opined that s 61(1)(a), (b), (c) and (d) shall be read conjunctively and we have no reason to depart from the said decision.

WHETHER LEGAL FEES CAN BE PAID FROM THE SEIZED'S PROPERTY

[32] Reverting to the instant case, the core issue is whether the respondent's legal fees can be paid from the respondent's properties that have been seized by order of the public prosecutor under s 50(1) and 51(1) of the Act being the proceeds of an unlawful activity. Hence, whether the High Court judge was correct in returning the legal fees of RM398,722 to the intervener.

[33] As alluded to earlier, the scheme and purpose of the Act is to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act. This also includes preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting the provision of s 61(4) of the Act. This too, is in consonant with s 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

Section 17A

17A. In the interpretation of a provision of an Act, *a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.* (Emphasis added.)

[34] In this regard, the Federal Court in the case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24 has succinctly explained the application of the purposive approach in the following manner:

A On the proper application of the provision of the said s 17A of the Interpretation Act *we would refer to the case of All Malayan Estate Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 4 CLJ 195 wherein this court had laid down the principles, inter alia, as follows:

B In summarising the principle governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:

(1) Legislation is always to be understood first in accordance with its plain meaning.

(2) Where the plain meaning is in doubt, the courts will start the process C of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.*

D

(4) *Where the particular reading would advance the purpose identified, but would strain the plain meaning of the provision enacted, the result will depend on the context and, in particular, on the balance of clarity of the purpose identified and the degree of strain on the language.*

E (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advance without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of the particular case, to leave to the legislature the task of extending or modifying the legislation.

F

(see also *Benjamin William Hawkes v Pendakwa Raya* [2020] 5 MLJ 417; [2020] 8 CLJ 267(FC)). (Emphasis added.)

[35] Coming back to the present case, the words 'legitimate legal interest' in G sub-s 61(4)(a) is not defined under the Act. This imports contradictory interpretation by parties involved as happened in this case. Hence, it is appropriate for the application of the purposive approach and to have regard to the intention of the legislature, inter alia, that no one should enjoy the proceeds of an unlawful property. This includes, the payment of the respondent's legal H fees to the intervener. Moreover, there is no express provision under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees.

[36] In Singapore Court of Appeal case, *Centillion Environment & Recycling* I *Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2013] 1 SLR 444; [2012] SGCA 65, the court acknowledged the difference between the Singapore's Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act ('the CDSA') and South African Prevention Of Crime Act 1998 ('the POCA') where the latter has an

express provision which empowers the High Court to direct for legal expenses to be paid from the illegal proceeds seized by the authority. Chan Sek Keong CJ, delivering the judgment of the court stated this:

> 40 The ABSA Bank cases involved an application by a bank which was a judgement creditor of one Trent Gore Fraser ('Fraser'). Fraser was indicted of charges relating to racketeering, money laundering and drug trafficking, and a restrain order was granted in relation to Fraser's property under the South African POCA. *Fraser then took out an application under s 26(6) of the South African POCA seeking an order for the curator bonis of the restrained property to sell a portion of his property to pay legal expenses in his criminal trial*. The bank applied to intervene and oppose Fraser's application on the basis of judgment it had obtained against Fraser. *The Supreme court of South Africa held (at [21] of ABSA Bank (Supreme Court)) that s 31 of the South African POCA authorized the High Court to direct 'such payment' out of the realized proceeds of the defendant's property before the proceeds are applied in satisfaction of the confiscation order.* The intention of this provision was to provide creditors with the means of bringing their claims to the court's attention to be taken into account before satisfaction of the confiscation order, and the High Court must accordingly retain the power to entertain applications by such creditors with claims in the restrained property (at [22] of ABSA Bank (Supreme Court). *This power was equally exercisable when the court exercised its wide discretion under s 26(6) to release restrained property to meet legal expenses incurred by the defendant (at [28] of ABSA Bank (Supreme Court)). The decision of the Supreme Court was thus premised on the South African POCA, which differs materially from CDSA.* (Emphasis added.)

[37] Clearly, the law in Singapore and Malaysia has no such express provision as the South African POCA which allows for the payment of the legal expenses from the seized property. Therefore, the High Court judge in the instant case erred in allowing the intervener's application for the legal fees to be paid from the respondent's seized properties as there was no express provision allowing the said application and it was against the intention of the legislature in enacting the Act.

[38] Referring back to the *Centillion*'s case, the Chief Executive Officer of the company committed an offence of criminal breach of trust in the sum of US$51,196,938.52. His properties were seized under the CDSA but no prosecution was made against him as he had absconded and could not be found. The company then brought a civil suit against him for the said sum of monies misappropriated and obtained judgment in default of appearance. Thereafter, the company filed a claim for the judgment sum from the seized property under s 13 of the CDSA which provides as follows:

> 13 Protection of rights of third party.
>
> (1) Where an application is made for the confiscation order under section 4 or 5, *a person who asserts an interest in the property may apply to the court,* before the confiscation order is made, for an order under subsection (2).

A (2) If a person applies to the court for an order under this subsection in respect of his interest in property and the court is satisfied —

(a) that he was not in any way involved in the defendant's drug trafficking or criminal conduct, as the case may be; and

B (b) that he acquired the interest —

(i) for sufficient consideration; and

(ii) without knowing, and in the circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was involved in or derived from drug trafficking or criminal conduct, as the case may be, the court shall make an order declaring the nature, extent and value (as at the time the order is made) of his interest.

D **[39]** It was decided in the said case that the company, in executing the judgment only has a right in personam and not the proprietary interest in the properties seized by the authority. At para 4 of the judgment, it was held as follows:

E (4) *The right to execute a judgment against the entirety of a judgment debtor's assets was only a right in personam that did not, without more, give the judgment creditor a proprietary interest in any asset of the debtor*. Centillion's unsatisfied debt did not give Centillion an interest under s 13 in the Executable Properties. A judgment creditor could not satisfy the requirements of s 13(2) as he had not 'acquired' any interest in the properties of the judgment debtor ... (Emphasis added.)

F

[40] Reverting to the instant case, firstly, there was a contractual relationship between the intervener and the respondent. It was a contract between a solicitor and his client. This has been lucidly explained by the Federal Court in G *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 in the following words:

H [43] Once a solicitor-client relationship exists and thus a retainer, it 'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interest' of his client 'in matters to which the retainer relates by all proper means'.

[41] In the circumstances, the intervener has the recourse to take legal action I against the respondent for the unpaid legal fees under the said contract. This action is an action in personam and no proprietary interest can be attached to the respondent's seized properties which is the proceeds of an unlawful activity. This is applicable only if judgment has been obtained against the respondent for the payment of the legal fees, which is none in the present case.

[42] In addition, if legal fees or any unpaid debt can be paid from the seized property under this Act, in particular if the debt is only based on the bill issued by the creditor, arrangement can easily be made by the creditor and the owner of the seized property to avoid the forfeiture of the said property. This clearly, will frustrate the intention of the legislature and not in compliance with sub-s 61(4)(d) of the Act which states:

> (d) the claimant did not acquire any right in the property from a person proceeded against under the circumstances that *give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property*; (Emphasis added.)

[43] Therefore, we are of the considered view that the respondent's legal fees cannot be paid from his seized properties and the intervener has no legitimate legal interest in the property. Consequently, the intervener cannot be considered as a bona fide third party under the Act.

THE RIGHTS TO COUNSEL UNDER THE FEDERAL CONSTITUTION.

[44] On the issue of the respondent's rights to counsel, we agree that this right is guaranteed under the Federal Constitution as provided under art 5(3). However, the fact that payment of legal fees cannot be made from the seized property, as it was the proceeds of an unlawful activity, should not be considered as hindering the rights to counsel.

[45] The law as mentioned earlier, only mandated the seizure of property which is the proceeds of an unlawful activity. If the property is from a lawful means, either the property would not be seized or if seized it would be returned to the owner as happened in the present case where certain properties of the respondent were returned to him. This is reflected in the evidence of the respondent's counsel when he said this in his written statement:

> S: Adakah kerja-kerja atas lantikan kamu telah dilaksanakan?
>
> J: Sudah. Bagi permohonan Habeas Corpus atas penahanan responden, Mahkamah Tinggi Kuala Lumpur telah membenarkan permohonan responden dan responden telah pun dilepaskan. Tiada sebarang rayuan terhadap keputusan Hakim Mahkamah Tinggi tersebut. *Selanjutnya, bagi permohonan pelepasan aset responden, sebahagian asset responden telah pun dilepaskan.*

[46] Our point here is that the respondent's legal fees can still be paid by him from his properties which were not proceeds of an unlawful activity. Here, the issue of rights to counsel raised by the counsel for the intervener is untenable.

[47] On the same issue, the contention by counsel for the intervener that art 5(3) of the Federal Constitution indirectly, imposes the responsibility on

A the respondent to pay his legal fees is misconceived. Nothing in art 5(3) or other related articles that can be discerned to impose the responsibility to pay the legal fees.

B **[48]** On the interpretation of an article of the Federal Constitution, it is instructive to make reference to the Federal court case of *Dato' Seri Ir Haji Mohammad Nizar Jamaluddin v Dato' Seri Zambry Abdul Kadir; Attorney General (intervener)* [2010] 2 CLJ 925 where this was stated:

C [26] *NS Bandra's Interpretation of Statutes*, 10th Ed at p 1295 speaks of two theories of the interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties.' From the authorities cited above our courts are incline to the organic theory in the interpretation of the Constitution.

D [27] On other important guide in the interpretation of the Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a

E particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous.

F (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 1 CLJ 701).

[49] Guided by the principle laid down in *Dato' Seri Ir Hj Jamaluddin's* case, we find the counsel for the intervener's interpretation of art 5(3) that indirectly imposes on the respondent to pay the legal fees is devoid of any merits.

G

[50] We also noted that the High Court judge in allowing the application for payment of the legal fees premised his decision on the fact that he was bound by the decision of this court in *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal W-09–432–11 Tahun 2016 (unreported). However,

H there was no written judgment of the said case for the High Court to appreciate the ratio and reasons for its decision.

CONCLUSION

I

[51] For the reasons above, we allow the appeal by the public prosecutor and the decision by the High Court judge in allowing the payment of the intervener's legal fees from the respondent's seized property is set aside.

Appeal allowed.

Reported by Mohd Kamarul Anwar